

**EVERETT CITY COUNCIL AGENDA ITEM COVER SHEET**

**PROJECT TITLE:**

Sales Order with Cummins,  
Inc. for a Transfer Switch to  
replace failing equipment

\_\_\_\_\_ Briefing  
\_\_\_\_\_ Proposed Action  
\_\_\_\_\_ Consent  
\_\_\_\_\_ ☒ Action  
\_\_\_\_\_ First Reading  
\_\_\_\_\_ Second  
\_\_\_\_\_ Reading  
\_\_\_\_\_ Third Reading  
\_\_\_\_\_ Public Hearing

COUNCIL BILL # \_\_\_\_\_

Originating Department Finance/Purchasing

Contact Person Clark Langstraat

Phone Number 425-257-8901

FOR AGENDA OF October 5, 2016

Initialed by:

Department Head \_\_\_\_\_

CAA \_\_\_\_\_

Council President 

**Location**

**Preceding Action**

**Attachments**

**Department(s) Approval**

Sales Order with Terms

Utilities,  
Finance/Purchasing

Amount Budgeted	\$3,200	
Expenditure Required	\$3,200	Account Number(s): 401 5200109633310
Budget Remaining	-0-	
Additional Required	-0-	

**DETAILED SUMMARY STATEMENT:**

Public Works requires a Transfer Switch to replace failing equipment that switches power from Snohomish County Public Utilities District to City backup power during an outage. The Sales Order from Cummins, Inc. contains indemnification and hold harmless language.

**RECOMMENDATION** (Exact action requested of Council): Authorize the Mayor to sign the attached Sales Order with Cummins, Inc. for a Transfer Switch to replace failing equipment.

This sales order including, but not limited to all terms and conditions on the following pages, shall not be binding on Cummins Inc unless executed by the president, a vice president or a sales manager of Cummins Inc, or by the manager of the branch listed above, in addition to the sales representative.

4. **Security Interest.** To secure payment, the Customer grants Cummins Inc a purchase money security interest in the Equipment; risk of loss of the Equipment shall transfer to Customer upon delivery of the Equipment. If any portion of the balance due is to be paid following delivery of the Equipment, Customer agrees to execute and deliver to Cummins Inc such security agreements, financing statements including but not limited to a UCC-1 Form, deed of trust, and such other documents as Cummins Inc may request from time to time in order to permit Cummins Inc to obtain and maintain a perfected security interest in the Equipment on terms and conditions acceptable to Cummins Inc; in the alternative, Customer grants to Cummins Inc a power of attorney to execute and file on Customer's behalf all financing statements and other documents necessary to perfect this security interest. At its election, Cummins Inc may file for recordation this Sales Order or a resulting invoice, bearing Customer's signature, or a photocopy of this Sales Order, in lieu of a UCC-1 Form; provided, however, that such filing by Cummins Inc shall not constitute an admission by Cummins Inc of the applicability or nonapplicability of the Uniform Commercial Code, or any statutory enactment thereof, to the purchase by the Customer, nor shall the failure to file this form, or the UCC-1 Form, in any way affect, alter or invalidate any term, provision, obligation or liability under this Sales Order. This security interest shall be superseded if Customer and Cummins Inc enter into a separate security agreement covering the Equipment.

5. **Condition of Equipment and Exclusive Limited Warranty; Limitation of Liability.** Customer acknowledges and agrees by signing this Sales Order, or by accepting delivery of the Equipment and a copy of this Sales Order, that the Customer has fully inspected the Equipment, and has received the Equipment from Cummins Inc in a satisfactory, safe and serviceable condition. CUSTOMER PURCHASES THE EQUIPMENT "AS IS" FROM CUMMINS INC AND CUMMINS INC MAKES NO REPRESENTATION OR WARRANTY AS TO THE FITNESS OF THE EQUIPMENT FOR ANY PARTICULAR USE OR PURPOSE, AS TO THE CONDITION, QUALITY OR MERCHANTABILITY OF THE EQUIPMENT, OR ANY OTHER REPRESENTATION OR WARRANTY, EXPRESS OR IMPLIED, AND MAKES NO WARRANTIES OF ANY KIND, EXPRESS OR IMPLIED, EXCEPT THAT THE EQUIPMENT SHALL BE FREE FROM DEFECTS AND WORKMANSHIP AND MATERIAL UNDER NORMAL USE AND SERVICE AND EXCEPT AS PROVIDED IN WARRANTY MATERIALS ALREADY DELIVERED TO THE CUSTOMER, WHICH ARE DESCRIBED ON THE REVERSE SIDE OF THIS SALES ORDER AND THE RECEIPT OF WHICH CUSTOMER ACKNOWLEDGES BY SIGNING THIS SALES ORDER, OR BY ACCEPTING DELIVERY OF THE EQUIPMENT AND A COPY OF THIS SALES ORDER. THE SOLE RESPONSIBILITY AND LIABILITY OF Cummins Inc UNDER THIS SALES ORDER IS TO REPAIR OR REPLACE THE EQUIPMENT, IN THE MANNER DESCRIBED IN SUCH WARRANTY MATERIALS. IN NO EVENT SHALL Cummins Inc BE LIABLE UNDER ANY EXPRESS OR IMPLIED WARRANTY OR FOR ANY SPECIAL, PUNITIVE, INDIRECT, INCIDENTAL, OR CONSEQUENTIAL DAMAGES, INCLUDING BUT NOT LIMITED TO LOSS OF TIME, INCONVENIENCE, LOSS OF USE OF THE EQUIPMENT, LIABILITY FOR PERSONAL INJURY, OR PROPERTY DAMAGE, AND REGARDLESS OF WHETHER THE ALLEGED LIABILITY IS BASED IN CONTRACT OR ANY OTHER LEGAL THEORY, THAT IN ANY WAY ARISE OUT OF OR RELATE TO CUSTOMER'S PURCHASE OF EQUIPMENT UNDER THIS AGREEMENT. IN NO EVENT, REGARDLESS OF THE FORM OF CLAIM OR CAUSE OF ACTION, SHALL Cummins Inc'S LIABILITY TO CUSTOMER AND/OR CUSTOMER'S CUSTOMERS EXCEED THE PRICE PAID BY CUSTOMER FOR THE SPECIFIC PRODUCTS PROVIDED BY Cummins Inc GIVING RISE TO THE CLAIM OR CAUSE OF ACTION.

6. **Loss or Destruction of Equipment; Customer Insurance.** Customer shall bear the risk of loss of, damage to, or destruction of the Equipment from the date of its delivery to the Customer through the date of full payment of the balance due. If for any reason the Equipment is lost, stolen, destroyed or damaged beyond repair prior to full payment of the balance due, the Customer shall immediately notify Cummins Inc. The total or partial loss of the Equipment by the Customer shall not release or relieve the Customer from its obligations and liabilities under this Sales Order. The Customer shall maintain in full force and effect until the full payment of the balance due insurance covering the Equipment of such type and in such amounts as Cummins Inc may require; written evidence satisfactory to Cummins Inc that such insurance is in full force and effect shall be provided to Cummins Inc upon its request at any time prior to full payment of the balance due. NOTWITHSTANDING ANY OTHER PROVISION OF THIS SALES ORDER OR OF ANY OTHER WRITING, Cummins Inc WAIVES NO RIGHT OF SUBROGATION WHICH MIGHT IN ANY WAY APPLY TO THE EQUIPMENT, TO ITS LOSS OR DESTRUCTION, TO BODILY OR PERSONAL INJURY TO, OR DEATH OF, ANY PERSON, OR TO THE LOSS OF OR DAMAGE TO ANY PROPERTY OF THE CUSTOMER OR ANY THIRD PARTY.

7. **Location of Equipment.** The Equipment shall remain personal property until permanently affixed to and made a part of real property of Customer; if the Equipment is so permanently affixed prior to full payment of the balance due, the Customer shall provide notice to Cummins Inc within [three (3)] days. Prior to full payment of the balance due, the Equipment will be kept by the Customer at the location(s) specified in this Sales Order, and will not be moved from such location (s) without the prior notice to Cummins Inc; and Cummins Inc shall have the right to inspect the Equipment at all reasonable times.

8. **Default; Remedies.** Customer shall be in breach and default under this Sales Order if (a) any payment or any other amount due under this Sales Order to Cummins Inc is not paid promptly when due; (b) the Customer fails to comply or perform, or makes any misrepresentation relating to, any of the Customer's obligations or covenants under this Sales Order; or (c) prior to full payment of the balance due, the Customer ceases to do business, becomes insolvent, makes an assignment for the benefit of its creditors, appoints a receiver, commences an action for dissolution or liquidation, or becomes subject to bankruptcy proceedings, or the Equipment is attached, levied upon, seized under legal process, is subjected to a lien or encumbrance, or transferred by operation of law or otherwise, to anyone other than Cummins Inc. Upon the occurrence of any event of Customer's default as set forth in the preceding paragraph, Cummins Inc, at its sole option and without notice to the Customer, shall have the right to exercise concurrently or separately any one or all of the following remedies, which shall be cumulative and not alternative: (a) to declare all sums due, and to become due, under this Sales Order immediately due and payable; (b) to commence legal proceedings, including collection actions and specific performance proceedings, to enforce performance by the Customer of any and all provisions of this Sales Order, and to be awarded damages or injunctive relief for the Customer's breach; (c) to require the Customer to deliver the Equipment to Cummins Inc's branch specified on the face of this Sales Order; (d) to exercise one or more of the rights and remedies available to a secured party under the Uniform Commercial Code, whether or not this Sales Order is subject thereto; and (e) to enter, without notice or liability or legal process, onto any premises where the Equipment may be located, using force permitted by law, and there to disconnect, remove and repossess the Equipment, the Customer having waived further right to possession after default. A waiver of any event of default by Cummins Inc shall not be a waiver as to any other or subsequent default.

9. **Notices.** All notices to be provided, or instruments required or permitted to be served upon, or sent to, either of the parties shall be in writing, and shall be deemed served or sent: (a) when personally delivered to the other party, (b) when sent by facsimile with receipt acknowledged, (c) one business day after being deposited with any nationally recognized overnight carrier which routinely issues receipts, addressed to the party at the address stated above, or (d) three (3) business days after being placed in the United States mails by certified mail, return receipt requested, postage prepaid, addressed to the party at the address stated above. Each of the parties may modify its notice address by communication sent to the other party in the manner described above.

10. **Reciprocal Indemnification.**

A. **Cummins Inc indemnification.** Subject to the limitations of paragraph 5, Cummins Inc specifically and expressly agrees to indemnify, defend and hold harmless, in whole or in part, the Customer, its agents and affiliates against and from any and all claims, demands, suits, losses, costs and damages of every kind and description, brought or made against or incurred by the Customer or any of its agents or affiliates resulting from, arising out of or in any way connected with the (i) willful act or omission or (ii) negligent act or omission of Cummins Inc or its employees, agents or affiliates, in performance, or nonperformance, of its obligations under this Sales Order. Subject to the limitations of paragraph 5, this indemnity obligation shall include, but not be limited to, the following:

- a. Loss of or damage to any property of the Customer, or any third party; and
- b. Bodily or personal injury to, or death of, any person, including without limitation employees of the Customer or of Cummins Inc.

B. **Customer indemnification.** The Customer specifically and expressly agrees to indemnify, defend and hold harmless, in whole or in part, Cummins Inc, its agents and affiliates against and from any and all claims, demands, suits, losses, costs and damages of every kind and description, brought or made against or incurred by Cummins Inc or any of its agents or affiliates resulting from, arising out of or in any way connected with the (i) willful act or omission or (ii) negligent act or omission of the Customer or its employees, agents or affiliates, in performance, or nonperformance, of its obligations under this Sales Order. This indemnity obligation shall include, but not be limited to, the following:

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11. **Delivery; Delay in Delivery; Inspection and Acceptance.** F.O.B. Factory, freight allowed to first destination. Any delivery, shipping, installation or performance dates indicated on the reverse side are estimated, and, although Cummins Inc shall use best efforts to meet such dates, Cummins Inc shall not be liable for any delay in delivery, shipping, installation, or performance, however occasioned. Cummins Inc may deliver the Equipment in installments as the Equipment becomes

available. Delivery of the Equipment to the Customer shall take place when physical possession of the Equipment is given to Customer or to a carrier, or when Cummins Inc receives directions from Customer to place the Equipment in storage, whichever first occurs. The securing of the Equipment on board a carrier shall be deemed to occur subsequent to delivery. If the Equipment is to be shipped, Cummins Inc is authorized to execute in Customer's name any carrier's standard bill of lading for the Equipment. Without being required to do so, Cummins Inc may, on behalf of Customer, advance the costs of shipping or insurance for the Equipment. To the extent not separately included in calculating the balance due under this Sales Order, Customer agrees to immediately reimburse Cummins Inc on demand for such costs. Customer agrees to inspect each item of Equipment, at its sole expense, promptly following receipt and will be deemed to have accepted the item unless it notifies Cummins Inc, within 10 days following receipt, of any claimed discrepancy between the item as described on the reverse side and the item as received by Customer. Any claim for shortages, delays or damages occurring after Cummins Inc has delivered the Equipment to a carrier shall be made directly to the carrier, and Cummins Inc shall have no liability with respect to such shortages, delays or damages.



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\_\_\_\_\_ Public Hearing

COUNCIL BILL # \_\_\_\_\_  
Originating Department Finance/Purchasing  
Contact Person Clark Langstraat  
Phone Number 425-257-8901  
FOR AGENDA OF October 5, 2016

Initialed by:

Department Head \_\_\_\_\_

CAA \_\_\_\_\_

Council President 

**Location**

**Preceding Action**

**Attachments**

Sales Order with Terms

**Department(s) Approval**

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Amount Budgeted	\$3,200	
Expenditure Required	\$3,200	Account Number(s): 401 5200109633310
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**10. Reciprocal Indemnification.**

**A. Cummins Inc indemnification.** Subject to the limitations of paragraph 5, Cummins Inc specifically and expressly agrees to indemnify, defend and hold harmless, in whole or in part, the Customer, its agents and affiliates against and from any and all claims, demands, suits, losses, costs and damages of every kind and description, brought or made against or incurred by the Customer or any of its agents or affiliates resulting from, arising out of or in any way connected with the (i) willful act or omission or (ii) negligent act or omission of Cummins Inc or its employees, agents or affiliates, in performance, or nonperformance, of its obligations under this Sales Order. Subject to the limitations of paragraph 5, this indemnity obligation shall include, but not be limited to, the following:

- a. Loss of or damage to any property of the Customer, or any third party; and
- b. Bodily or personal injury to, or death of, any person, including without limitation employees of the Customer or of Cummins Inc.

**B. Customer indemnification.** The Customer specifically and expressly agrees to indemnify, defend and hold harmless, in whole or in part, Cummins Inc, its agents and affiliates against and from any and all claims, demands, suits, losses, costs and damages of every kind and description, brought or made against or incurred by Cummins Inc or any of its agents or affiliates resulting from, arising out of or in any way connected with the (i) willful act or omission or (ii) negligent act or omission of the Customer or its employees, agents or affiliates, in performance, or nonperformance, of its obligations under this Sales Order. This indemnity obligation shall include, but not be limited to, the following:

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11. Delivery; Delay in Delivery; Inspection and Acceptance. F.O.B. Factory, freight allowed to first destination. Any delivery, shipping, installation or performance dates indicated on the reverse side are estimated, and, although Cummins Inc shall use best efforts to meet such dates, Cummins Inc shall not be liable for any delay in delivery, shipping, installation, or performance, however occasioned. Cummins Inc may deliver the Equipment in installments as the Equipment becomes

available. Delivery of the Equipment to the Customer shall take place when physical possession of the Equipment is given to Customer or to a carrier, or when Cummins Inc receives directions from Customer to place the Equipment in storage, whichever first occurs. The securing of the Equipment on board a carrier shall be deemed to occur subsequent to delivery. If the Equipment is to be shipped, Cummins Inc is authorized to execute in Customer's name any carrier's standard bill of lading for the Equipment. Without being required to do so, Cummins Inc may, on behalf of Customer, advance the costs of shipping or insurance for the Equipment. To the extent not separately included in calculating the balance due under this Sales Order, Customer agrees to immediately reimburse Cummins Inc on demand for such costs. Customer agrees to inspect each item of Equipment, at its sole expense, promptly following receipt and will be deemed to have accepted the item unless it notifies Cummins Inc, within 10 days following receipt, of any claimed discrepancy between the item as described on the reverse side and the item as received by Customer. Any claim for shortages, delays or damages occurring after Cummins Inc has delivered the Equipment to a carrier shall be made directly to the carrier, and Cummins Inc shall have no liability with respect to such shortages, delays or damages.



12. Customer's Responsibility. The Customer represents that it is fully familiar with the Equipment subject to this Sales Order and understands the operating instructions for the Equipment and agrees to perform routine maintenance services. Until full payment of the balance due, Customer shall care for the Equipment properly, at Customer's sole expense, maintaining the Equipment in good operating condition, repair and appearance; the Customer shall use the Equipment safely, within its rated capacity only, and only for the purposes for which it was designed; the Customer is aware of the limitations of the Equipment and shall not exceed them; and the Customer shall not alter or modify the Equipment. Except to the extent provided in the express warranties under paragraph 5, Customer agrees that, even though it may receive technical information, drawings or advice from Cummins Inc, the Customer will have sole responsibility (a) for the Equipment's suitability for Customer's intended use and (b) where the Equipment is to be used as part of a power, propulsion or other system, for the installation of the Equipment, the design and performance of such system, and the adequacy of such system for the particular needs of Customer. THE PROVISIONS OF THIS SALES ORDER, INCLUDING LIMITATIONS OF WARRANTIES, REMEDIES AND DISCLAIMERS, SHALL APPLY EQUALLY TO ALL SUCH TECHNICAL INFORMATION, DRAWINGS OR ADVICE.

13. No Assignment of Rights and Obligations under This Sales Order. This Sales Order and the rights, obligations, covenants and agreements contained in this Sales Order, shall inure to the benefit of and be binding upon the parties to this Sales Order and their respective successors and assigns. The Customer shall not assign, by operation of law or otherwise, this Sales Order or any rights under this Sales Order without first obtaining the prior written consent of Cummins Inc, which consent may not be unreasonably withheld; any attempt to assign by Customer without Cummins Inc's prior written consent shall be void and of no effect. Cummins Inc may assign this Sales Order and all rights under this Sales Order, but the Customer will not be obligated to any assignee of Cummins Inc, except after receipt of written notice of such assignment by Cummins Inc. CUSTOMER HEREBY WAIVES, RELINQUISHES AND DISCLAIMS AS TO ANY ASSIGNEE OF Cummins Inc ALL CLAIMS, RIGHTS OF SET-OFF AND DEFENSES WHICH CUSTOMER MAY HAVE AGAINST Cummins Inc, INCLUDING THE RIGHT TO WITHHOLD PAYMENT OF ANY MONIES WHICH MAY BECOME DUE UNDER THIS SALES ORDER. CUSTOMER FURTHER AGREES THAT Cummins Inc MAY, WITHOUT NOTICE TO OR CONSENT OF CUSTOMER, SELL OR GRANT A SECURITY INTEREST IN THE EQUIPMENT AND ITS RIGHTS TO PAYMENT OF THE BALANCE DUE, AND IN SUCH EVENT, CUSTOMER'S RIGHTS IN AND TO THE EQUIPMENT SHALL BE SUBJECT AND SUBORDINATE TO THE INTERESTS AND RIGHTS, INCLUDING THE RIGHT OF POSSESSION, OF ANY SUCH PURCHASER OR HOLDER OF A SECURITY INTEREST IN THE EQUIPMENT.

14. Miscellaneous Provisions.

A. The Customer and Cummins Inc, subject to the requirement that this Sales Order be executed by the president, a vice president, a sales manager or a branch manager of Cummins Inc, warrant and represent that they have the full power and corporate authority to execute this Sales Order. A written list of all officers, sales and branch managers of Cummins Inc is available upon request.

B. Changes after an order has been placed with the manufacturer will be subject to an order revision fee equal to five percent (5%) of the original stated purchase price. If Customer cancels all or a portion of this Sales Order after release to Cummins Inc, a cancellation charge of not less than fifteen percent (15%) of the cancelled portion of this order must be paid in addition to actual, non-recoverable costs incurred by Cummins Inc.

C. In the event either party to this Sales Order commences legal action in connection with the provisions of this Sales Order, including any action to obtain damages from an alleged breach of a provision of this Sales Order, any such action shall, at the election of Cummins Inc, be commenced in a court of competent jurisdiction in, and venue for any such legal action shall continue to be King County, Washington, Multnomah County, Oregon, or the county where the branch listed on the reverse side is located; and the prevailing party shall be entitled to recover, in addition to amounts otherwise recovered, its reasonable costs incurred in connection with that legal action, including but not limited to reasonable attorneys' fees.

D. The covenants, agreements, indemnities and warranties made by the parties under this Sales Order shall survive its termination.

E. In addition to other covenants above, each party agrees to indemnify, hold harmless and defend the other party with respect to any suit, claim or demand alleging infringement of any patent or copyright, or misappropriation of any confidential information or trade secrets, in connection with the Equipment sold under this Sales Order. Each party agrees to keep confidential and not to disclose to other persons, or to use in any way, confidential business or technical information which the party may receive in connection with this Sales Order.

F. The parties acknowledge that Cummins Inc is not a contractor within the meaning of any federal, state or local law or regulation, that it therefore has not posted a bond and will post no bond, and that it has no duties or obligations of a contractor or subcontractor with respect to the Equipment, Cummins Inc's duties and obligations being limited to those described in this Sales Order.

G. Any previous oral or written agreements relating to the subject matter of this Sales Order are hereby superseded, the parties expressly agreeing that the terms and provisions of this Sales Order shall constitute the full and complete agreement between Cummins Inc and the Customer. All terms and conditions of any other purchase order, sales order or other writing, of Cummins Inc or of Customer, unless specifically described above and attached to this Sales Order, which are inconsistent with or different from the terms and conditions of this Sales Order shall be null and void. If any term or provision of this Sales Order shall be held to be invalid or unenforceable, the remaining terms and provisions of this Sales Order shall be valid and enforceable to the fullest extent permitted by law.

H. Cummins Inc shall not be liable for its inability to perform any or all of its obligations under this Sales Order due to any cause beyond Cummins Inc's control, including but not limited to acts of God, acts or omissions of the Customer, acts of civil or military authorities, fire, weather, strikes or other labor disturbances, civil commotion, war, late delivery by Cummins Inc's suppliers, fuel or other energy shortages, or an inability to obtain necessary labor, materials, supplies, equipment or manufacturing facilities. If any such cause results in a delay in performance by Cummins Inc, the date of performance shall be extended for a period equal to the time lost by reason of such delay, and such extension shall be Customer's exclusive remedy.

I. This Sales Order and its interpretation shall be governed by the laws of the State of Washington.